

Seremban Engineering Bhd v Nandakumar a/l Perumal
(trading under the name and style of New Trax Resources)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
24NCC-320-08 OF 2015
NOORIN BADARUDDIN JC
10 MARCH 2016

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Companies and Corporations — Winding up — Declaration — Defendant issued 218 Notice to plaintiff for amount allegedly owed by plaintiff — Plaintiff disputed defendant's claim — Plaintiff filed application for declaration that defendant was not creditor and that defendant prevented from filing winding up petition — Whether claim disputed — Whether defendant right in issuing 218 notice — Whether plaintiff should file police report to substantiate disputed debt — Whether defendant creditor — Companies Act 1965 s 218

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The defendant was hired as a subcontractor in the 'Mechanical Work-2 (Urea Plant & UOA)' ('M2 Package') by the plaintiff for the erection of the cooling tower and structural works ('the works'). The plaintiff had paid the defendant for all the invoices issued for the works except for the last two invoices amounting to RM644,506.51. The defendant then issued a letter of demand pursuant to s 218 of the Companies Act 1965 ('the 218 Notice') demanded payment of the sum of RM645,191.80. In response, the plaintiff issued a letter to the defendant disputing the debt and set out the detailed basis for doing so. The plaintiff had also requested that the defendant retract the 218 Notice pending the plaintiff's thorough investigation of the matter but the defendant refused to retract. As such, the plaintiff filed the present application for: (a) a declaration that the defendant was not a creditor pursuant to s 217(1) and/or s 218 of the Companies Act 1965 ('the CA'); (b) a declaration that the defendant was prevented from filing any winding up petition for the sum of RM645,191.80; and (c) an order that the defendant, through any of its members be restrained from presenting any winding up petition for the said sum. The plaintiff contended that, from the audit by an independent auditor called BDO Malaysia ('BDO'), there was an overrun of the amount claimed by the defendant in the sum of RM4,210,243.55 for the works. Further, the plaintiff had forwarded a cheque amounting to RM645,191.80 to its solicitors and averred that it was not unable to settle the debt as stated in the 218 Notice. The defendant submitted that there was an admission by the plaintiff that they have been paying the invoice to the defendant for the supply of labour and now the defendant could not be denied of its' right as a creditor. The defendant further submitted that the plaintiff's application could not be allowed because there was no police report filed by the plaintiff based on the BDO report against the defendant for the various allegations of fraud and mismanagement.

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A It was also submitted that the BDO report did not provide any evidence to support the contention of alleged overpayment to the defendant by the plaintiff.

Held, allowing the application with costs:

- B (1) In deciding whether to grant an injunction to restrain a petition based on a statutory demand for a debt, the court must be satisfied that the debt was bona fide disputed. It was clear from the evidence that the plaintiff's claim was vigorously disputed. The proper cause of action for the
- C defendant was that the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated in the usual way rather than to persist along the route of presentation of winding up petition (see paras 36–37).
- D (2) There was no necessity for the lodging of a police report by the plaintiff to substantiate the disputed debt as it was up to the plaintiff to do so or otherwise. The BDO report was sufficient to show the present of clear and substantial grounds as to why the defendant's claim was bona fide disputed (see para 42).
- E (3) The defendant had failed to address the challenges to the claimed sum put up by the plaintiff and since the amount owing by the plaintiff to the defendant under the 218 Notice was not an afterthought and substantiated by an external professional investigative audit, the defendant was not a 'creditor' within the meaning of s 218(2)(a) of the
- F CA (see para 43).
- G (4) The defendant was not deprived of a remedy. As it is trite that a winding up court should not be used as a debt collection agency, the defendant was entitled to bring an action in the civil courts and seek the recovery of the outstanding debt it intends to obtain. On the other hand, if the winding up petition was not prevented despite the substantive disputed debt being raised, the plaintiff as a public listed company will be severely affected. The risk of doing injustice to the plaintiff was greater than the risk to the defendant. The 218 Notice should not be a medium to exert improper pressure in order to force payment of the alleged debt as this
- H would essentially constituted an abuse of process (see paras 47–48).

[Bahasa Malaysia summary]

I Defendan dilantik sebagai subkontraktor dalam 'Mechanical Work-2 (Urea Plant & UOA)' ('Pakej M2') oleh plaintiff bagi pembangunan menara penyejuk dan kerja-kerja penstrukturan ('kerja-kerja'). Plaintiff telah membuat bayaran kepada defendan untuk semua invoices yang dikeluarkan bagi kerja-kerja kecuali dua invoices terakhir berjumlah RM644,506.51. Defendan kemudiannya mengeluarkan surat tuntutan di bawah s 218 Akta Syarikat 1965 ('Notis 218') menuntut bayaran berjumlah RM645,191.80. Dalam

responnya, plaintif mengeluarkan surat kepada defendan mempertikaikan hutang tersebut dan memerihalkan asas yang terperinci berbuat sedemikian. Plaintif telah meminta agar defendan menarik balik Notis 218 sementara menunggu siasatan menyeluruh plaintif ke atas hal perkara tersebut tetapi defendan enggan menariknya. Dengan itu, plaintif memfailkan tindakan ini bagi: (a) satu deklarasi bahawa defendan bukan kreditor di bawah s 217(1) dan/atau s 218 Akta Syarikat 1965 ('AS'); (b) deklarasi bahawa defendan dihalang daripada mengemukakan apa-apa petisyen penggulangan bagi jumlah RM645,191.80; (c) satu perintah bahawa defendan, melalui mana-mana ahlinya dihalang daripada menyampaikan petisyen menggulung syarikat bagi jumlah tersebut. Plaintif menyatakan bahawa, berdasarkan audit oleh auditor bebas yang dikenali sebagai BDO Malaysia ('BDO'), terdapat jumlah terlampau yang dituntut oleh defendan berjumlah RM4,210,243.55 bagi kerja-kerja. Selanjutnya, plaintif telah mengemukakan satu cek berjumlah RM645,191.80 kepada peguamcara dan menyatakan bahawa ia tidak boleh menyelesaikan hutang yang dinyatakan Notis 218. Defendan menghujahkan bahawa terdapat pengakuan oleh plaintif bahawa mereka telah membayar invois kepada defendan bagi bekalan buruh dan defendan kini tidak boleh dinafikan haknya sebagai kreditor. Defendan selanjutnya menghujahkan bahawa permohonan plaintif tidak boleh dibenarkan kerana tiada laporan polis yang difailkan oleh plaintif berdasarkan laporan BDO terhadap defendan bagi pelbagai dakwaan penipuan dan salah urusan. Dihujahkan lagi bahawa laporan BDO tidak memperuntukkan apa-apa keterangan untuk menyokong dakwaan bayaran berlebihan yang didakwa dibuat oleh defendan kepada plaintif.

Diputuskan, membenarkan permohonan dengan kos:

- (1) Dalam memutuskan untuk memberi injunksi bagi menghalang petisyen berdasarkan tuntutan statutori bagi hutang, mahkamah mestilah berpuas hati bahawa hutang dipertikaikan adalah *bona fide*. Jelas berdasarkan keterangan bahawa tuntutan plaintif amat dipertikaikan. Kausa tindakan yang sepatutnya buat defendan adalah apabila mereka tahu bahawa tuntutan mereka dipertikaikan, mereka sepatutnya membuktikan hutang mereka dengan memfailkan tindakan untuk mengadili hal itu dengan cara biasa dan bukan melalui cara mengemukakan petisyen penggulangan (lihat perenggan 36–37).
- (2) Tiada keperluan untuk membuat laporan polis tentang plaintif untuk membuktikan hutang yang dipertikaikan kerana ia bergantung pada plaintif untuk berbuat sedemikian atau sebaliknya. Laporan BDO cukup untuk menunjukkan alasan jelas dan besar mengapa tuntutan defendan *bona fide* dipertikaikan (lihat perenggan 42).
- (3) Defendan gagal menangani cabaran terhadap jumlah yang dituntut oleh plaintif dan memandangkan jumlah terhutang oleh plaintif kepada

- A** defendan di bawah Notis 218 bukanlah sesuatu yang difikirkan semula dan dibuktikan oleh penyiasat audit luar yang profesional, defendan bukan 'kreditor' bagi maksud s 218(2)(a) AS (lihat perenggan 43).
- B** (4) Defendan tidak dinafikan remedi. Adalah matan bahawa mahkamah penggulangan tidak sepatutnya digunakan sebagai agensi pungutan hutang. Defendan berhak membawa tindakan di mahkamah sivil dan memohon pemulangan hutang yang ingin diperolehinya. Sebaliknya, jika petisyen penggulangan tidak dihalang walaupun hutang amat dipertikaikan, plaintif sebagai syarikat tersenarai awam akan sangat terjejas. Risiko menyebabkan ketidakadilan kepada plaintif adalah lebih dahsyat daripada risiko kepada defendan. Notis 218 bukanlah medium untuk mengenakan tekanan yang tidak sepatutnya untuk memaksa bayaran hutang yang didakwa kerana ini akan, secara asasnya, membentuk satu salah guna proses (lihat perenggan 47–48).]
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Notes

For cases on winding up in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1261–2044.

E Cases referred to

IJM Corporation Bhd v Harta Kumpulan Sdn Bhd [2007] 8 MLJ 591; [2007] 8 CLJ 291, HC (refd)

Malayan Flour Mill Bhd v Raja Lope & Tan Co [2000] 6 MLJ 591; [2000] 7 CLJ 288, HC (refd)

F *Malaysian Resources Corporation Bhd v Juranas Sdn Bhd* [2002] 3 MLJ 169, HC (refd)

NWL Ltd v Woods; NWL Ltd v Nelson and another [1979] 3 ALL ER 614, HL (refd)

G *Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd, Re v Nima Travel Sdn Bhd* [1986] 2 MLJ 374 (refd)

Legislation referred to

Companies Act 1965 ss 217(1), 218, 218(2)(a)

H *Gregory Ling (Villie Nethi and CK Yeoh with him) (Ranjith Singh & Yeoh) for the plaintiff.*

S Ashok (Alvin John & Partners) for the defendant.

I Noorin Badaruddin JC:

[1] The plaintiff is a public limited company principally engaged in the fabrication of process equipment and metal structures and the provision of maintenance, repairs and shutdown works.

[2] The defendant is a sole proprietorship and is a subcontractor of the plaintiff in the projects which will be adumbrated in the later part of the judgment. A

[3] By way of encl 21, the plaintiff filed an amended originating summons seeking for the following reliefs: B

- (i) a declaration that the defendant is not a creditor pursuant to s 217(1) and/or s 218 of the Companies Act 1965 ('the CA'); C
- (ii) a declaration, based on the facts of the case, that the defendant is prevented from filing any winding up petition to wind up the plaintiff based on a statutory demand dated 11 August 2015 that was made pursuant to s 218 of the CA for the sum of RM645,191.80; D
- (iii) further to the declarations prayed in paragraphs (i) and/or (ii) hereinabove, an order that the defendant, through its directors, officers, employees, servants, agents, nominees or whomsoever otherwise be restrained from presenting any winding up petition for the sum of RM645,191.80; and E
- (iv) costs. E

[4] Pending the determination of encl 21, the plaintiff has sought an interlocutory injunction vide encl 7 to restrain the defendant from presenting a winding up petition pursuant to the statutory demand under s 218 of the CA dated 11 August 2015 issued or any amount claimed by the defendant from the plaintiff. The court on 23 December 2015 granted the order-in-terms for encl 7. F

THE PREVAILING CIRCUMSTANCES G

[5] On 12 August 2015, the plaintiff received a letter of demand pursuant to s 218 of the Companies Act 1965 ('the 218 Notice') from the defendant's solicitors. The 218 Notice demanded payment of the sum of RM645,191.80.

[6] The plaintiff disputes that it owes this sum of money to the defendant. In response to the 218 Notice, the plaintiff through its' solicitors, issued a letter on 25 August 2015 which recorded the plaintiff's vehement dispute of the debt and set out the detailed basis for doing so. H

[7] The letter of 25 August 2015 also requested that the defendant retract the 218 Notice by 5pm on 26 August 2015, pending the plaintiff's thorough investigation of the matter and in the event the defendant refused, the plaintiff I

A reserves its' rights to, inter alia, initiate legal action seeking interim relief. Despite this, the defendant's solicitors and/or the defendant did not retract the 218 Notice.

B [8] The receipt of the 218 Notice and the lack of response to the plaintiff's reply are the reasons for which the plaintiff is now seeking for the injunction in this present application.

THE PROJECT

C [9] Petronas Chemicals Fertilizer Sabah Sdn Bhd ('Petronas') required the construction of a Sabah Ammonia Urea ('SAMUR') chemical plant in Sipitang, Sabah ('the Samur Project'). To do so, Petronas contracted with Consortium of Apex Energy Sdn Bhd and PT Rekayasa Industri ('Consortium') to build the same.

D [10] In turn, Consortium sub contracted the 'Mechanical Work-2 (Urea Plant & UOA)' ('M2 Package') to Ingress Fabricators Sdn Bhd ('Ingress') for the contract price of RM41,620,063.63. This was effected through a letter of award dated 25 March 2013 and a contract dated 4 April 2013.

E [11] Ingress subsequently assigned the M2 Package to Kejuruteraan AsasKini Sdn Bhd (formerly known as ITC Engineering Sdn Bhd) ('KASB') by way of an assignment agreement dated 25 March 2013. At the same time, the Operations Director of KASB, Lee Say Yong ('SY Lee'), had entered into a finder's fee agreement with the plaintiff in respect of the Samur project, for the sum of RM5,630,063 ('the finder's fee')

F [12] By a letter of award dated 15 May 2013, KASB appointed the plaintiff to be the subcontractor responsible for the M2 Package of the Samur project for the contract price of RM41,620,063. This made the finder's fee become due and payable to SY Lee. Hence the effective contract price of the M2 package was RM36m. The plaintiff also entered into a contract of agreement with KASB which was executed on 18 July 2013 and supplementary letter of award dated 12 July 2013, both of which were also relevant to the M2 package.

G [13] The plaintiff then arranged to sub contract the works to Intivista Sdn Bhd ('Intivista'). There was no formal contract agreement between the plaintiff and Intivista. However, there was a work order dated 5 August 2013 that provided for Intivista to execute the M2 Package of the Samur project for the sum of RM24m. This was a global sum that encompassed all the works entailed in the M2 package.

[14] As a result of this arrangement, the plaintiff stood to gain approximately RM12m by virtue of its supervisory position of the M2 package. A

[15] However, on or about February 2014, a dispute arose between Intivista and the plaintiff. Intivista left the M2 package and the plaintiff absorbed approximately 100 of ex-Intivista workers and continued the M2 package in its own capacity. B

[16] The relevant portion of the M2 package is composed of two segments; the erection of the cooling tower and structural works. On or about May 2014, the plaintiff also engaged Amazon Engineering ('Amazon') to carry out the structural works portion of the M2 package. Amazon was retained as a subcontractor of the plaintiff from May 2014 to September 2014. C

THE RELATIONSHIP BETWEEN THE PLAINTIFF AND THE DEFENDANT D

[17] In August 2014, the defendant was hired as a subcontractor for both the erection of the cooling tower ('the cooling tower') and structural works ('the structural works'), hereinafter referred to collectively as 'the works'. The plaintiff and defendant did not enter into a formal agreement but a subsisting contract be inferred from the clear course of conduct and/or dealing between the said parties. Progressive claims invoiced by the defendant and paid by the plaintiff from August 2014 to April 2015 (exh 'S7') are shown in the plaintiff's affidavit affirmed by Tan Ah Ba @ Tan Ah Ping affirmed on 28 August 2015. E F

[18] From the said exh 'S7', the plaintiff's records show that the last two invoices issued by the defendant amount to RM644,506.51. According to the plaintiff, this figure differs from the sum claimed by defendant in the 218 Notice. G

[19] The last two invoices have remained unpaid. According to the plaintiff, there has been a gross cost overrun of the M2 package. Further, the plaintiff stated that the total contract sum was RM41,630,063.63 with an added RM9.1m for an approved variant order and yet the plaintiff realised that it had, in the course of the contract, paid out approximately RM69,650,000 to date. According to the plaintiff further, this amount to an actual current loss of RM24,650,000 sustained by them and that this figure fails to account for the ultimate potential loss that plaintiff is exposed to. H I

[20] Due to the magnitude of the sums involved, that such a gross cost overrun could not be the result of a mere oversight, rather it appeared to be a cause for concern, led the plaintiff to initiate further investigation.

A THE DISPUTED DEBT HAS BEEN SECURED

[21] In the interim, the plaintiff has compounded RM645,191.80 by forwarding a cheque for the said amount to the plaintiff's solicitors, namely, Messrs Ranjit Singh & Yeoh ('RSY'). By this gesture, the plaintiff averred that it is not unable to settle the debt that is the basis for the 218 Notice.

[22] It is on this basis that the plaintiff seeks this injunction to restrain the defendant from presenting a winding up petition. According to the plaintiff, the injunction sought ought to be allowed in order to preserve the status quo.

C THE INVESTIGATION

[23] The said cost overrun was one of the contributing factors that led the plaintiff to commission an investigative audit of the M2 package. The plaintiff engaged an independent external professional firm of accountants, namely, BDO Malaysia ('BDO') to assess the conduct and execution of the entire project. The plaintiff received the BDO report on 2 September 2015. Certain key elements of the report were emphasised by the plaintiff in the further affidavit.

[24] In essence, BDO found that the total amount invoiced by the defendant and paid by the plaintiff far surpassed the total amount that was claimable by the plaintiff from its client for the scope of works done. The plaintiff averred that this divergence failed a reasonableness test as designed and applied by BDO and means that even taking into account a premium payable to replace subcontractors (estimated at as high as 50%) and a further provision for delay/idling time caused by the client (also estimated at as high as 50%), the defendant has still claimed an excess that is, on the face of it, highly incredible and absurd. Regardless as to the premium given in favour of the defendant by BDO in their investigation, the over-claim even with these added premiums represents approximately 188% in excess of the expected claim and in monetary value of RM4,210,243.55.

[25] The plaintiff averred that such a huge cost overrun which represent almost double the expected price eliminated the possibility of it being caused by administrative oversight.

[26] In relation to the cooling tower, following p 23 of the BDO report, the plaintiff stated that the bill of quantities computed on the basis of tonnage was RM1,680 per tonne for a total of 448.52 tonnes which amounted to RM753,513.60. This represents the maximum figure that the plaintiff is able to claim from its client for these works but as at 25 April 2015, the plaintiff had only claimed RM676,872 from its client. However at that point, the defendant

had already claimed RM3,243,295.96 from the plaintiff. This difference indicated a huge cost overrun of RM2,175,804.24. A

[27] Following p 22 of the BDO report, in respect of the structural works, the plaintiff claimed that the bill of quantities computed on the basis of tonnage was RM1,680 per tonne for a total 1,338 tonnes which amounted to RM2,247,840. This represents the maximum figure that the plaintiff is able to claim from its client for these works. B

[28] As at 28 April 2015, the plaintiff had claimed RM1,720,085 which corresponded to 1,023.86 tonnes. Of this sum, RM979,215 was claimed by the defendant's predecessors ie before the defendant's tenure. This amounted to 582.87 tonnes. Hence, the remaining amount of works to be done by the defendant was 440.99 tonnes. In terms of the value of this 440.99 tonnes, the projected amount expected to be charged by the defendant (based on the unit rates charged by Amazon) was RM584,211.18. Even if the defendant was given the benefit of adding the abovementioned premium of 50% for delay/idle time caused by the client, the defendant's projected charge would still be in the region of RM1,168,422.36. C D

[29] However, the defendant's claim grossly exceeded this ballpark figure as the defendant's total claim for the structural works was RM3,202,861.67. The defendant's actual charge exceeded its projected charge by RM2,034,439.31 or 174% of the projected charge (and taking into account the two 50% premiums). E F

[30] The plaintiff further averred that from the BDO report and applying the reasonableness test adopted, there is an overrun of the amount claimed by the defendant in the sum of RM4,210,243.55 as set out at p 20 of the BDO report. G

[31] The plaintiff also stated that from the BDO report, other shortcomings were unearthed which may have contributed to the cost overrun to varying degrees. Taken in totality, the plaintiff believed that there was fraud perpetrated upon the plaintiff. There is clearly collusion between the defendant and certain key parties ie the plaintiff's former managing director, executive director, and project manager respectively at that material time, to systematically defraud the plaintiff. For the reasons stated above, the plaintiff decided to withhold the verification of the two final invoices claimed by the defendant. H

THE DEFENDANT'S CONTENTION I

[32] The defendant submitted that the reliefs prayed in encl 21 are unsustainable as there was an admission by the plaintiff that they have been

A paying the invoices to the defendant for the supply of labour and now the defendant cannot be denied of its' right as a creditor.

B [33] According to the defendant, the last two invoices cannot be ignored on the basis they are evidence of a separate contract for supply of labour given for separate period of time for the benefit of the plaintiff. It was the defendant's argument that until and unless there is a ruling from a civil court suggesting otherwise so long as the last two invoices have not been paid by the plaintiff, the defendant is entitled to its claim as valid and payable and to that extent that the defendant remains a creditor for all intent and purposes.

C [34] In adopting the earlier submission for encl 7, the defendant refuted the plaintiff's claim on the ground that the plaintiff's application cannot be allowed as there is no police report lodged based on the BDO report against the defendant or any employees of the plaintiff for the various allegations of fraud and mismanagement.

D [35] The defendant further submitted that the plaintiff's company auditor on record namely *Crowe Horwarth/NGL Tricor Governance Sdn Bhd* referred to in the BDO report did not provide any evidence to support the contention of alleged overpayment to the defendant by the plaintiff. The defendant alleged that the BDO report is dubious or suspicious as it is unsupported by the auditors of the company. It is the defendant's contention that there is only a bare allegation of the excess payment made for the first time after the s 218 notice has been served on the plaintiff. Without the police report lodged to that effect and/or without a legal action filed to that effect, there would be insufficient evidence to sustain the plaintiff's contention. The defendant submitted there is no real basis for suggesting that the filing of the petition on the said 218 Notice would be an abuse process in that the petition filed by the defendant would have no evidence of success.

THE COURTS' FINDINGS

H [36] In deciding whether to grant an injunction to restrain a petition based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed ie whether the said amount stated in the claim is disputed or otherwise. On the affidavit evidence before this court, it is clear that the amount stated in the plaintiff's claim is vigorously disputed.

I [37] It could be seen from exh S2 in the plaintiff's first affidavit that upon receiving the 218 Notice, the plaintiff through its' solicitors had issued a response dated 25 August 2015 detailing the grounds of the disputed claim. The preliminary grounds adopted by the plaintiff in its' letter of 25 August 2015 was later compounded by the findings by BDO in its' report. This court

found as a fact that the defendant received sufficient information that it did not have a proper undisputed debt. It is the considered view of this court and in accordance with the judgment of Shankar J in *Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374, the proper cause of action for the defendant (the plaintiff in *Re Nima Travel Sdn Bhd*) is that the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated in the usual way rather than to persist along the route of presentation of winding up petition.

[38] The conclusion reached in the BDO report showed that there was a 'clear indication of collusion ... to systematically approve and pay inflated charges from Nex Trax (the defendant)' confirms the existence of a collusive arrangement between the defendant and certain persons within the plaintiff's organisation to defraud the plaintiff. This court is satisfied that the BDO report being a report of an independent body in conducting the investigation rather than the internal auditor of the plaintiff, presents clear and substantial grounds as to why the defendant's claim is bona fide disputed and cannot be gain said as an internal matter.

[39] In analysing the report by BDO, the defendant had over-claimed by approximately 188% which translated into a monetary value of RM4,210,243.55 even after the inclusion of generous added premiums to cover the assumed prevailing circumstances. There was also a significant departure from the standard operating procedure mandated by the plaintiff in the selection, conduct and evaluation of the defendant, conflicts of interests and manipulation of the claim premised on the number of hours as opposed to the quantity delivered. The report also stated the detection of the unusual procedure by which the claims were processed in that the invoices were received without prior work order and the invoices would be approved by certain key personnel without a check and balance system. The defendant's invoices were also found to be processed within an uncommonly short time frame in comparison to invoices submitted by other subcontractors and the normal duration for claims processing.

[40] From the affidavit filed, this court found that there are no reasons set out by the defendant as to the inflated sums which overwhelmed the original amount entitled to be claimed by the defendant. The plaintiff pointed out that the invoices along with the supporting documentation comprising time sheets reproduced by the defendant was flagged as unusual by the BDO report as the industry standard provides for charges to be based on a quantity completed basis (ie according to tonnage) as opposed to manpower basis.

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A [41] In the face of such clear and serious evidence in the BDO report, the defendant's affidavits in reply offered no actual retort. The defendant reply was a simple allegation that the BDO report is prejudicial by nature as it only focuses on the defendant, excluding other subcontractors. The defendants proffered no evidence to support the contention. In fact, the plaintiff highlighted to this court that in the BDO report the pre-existing relationships between the defendant and relevant parties involved in the M2 package of the Samur project was identified. There were connections between the defendant and KASB, SY Lee (the owner of KASB) and the managing director of the plaintiff for the post project of the M2 package.

C [42] This court is also satisfied that there is no necessity for the lodging of a police report by the plaintiff to substantiate the disputed debt as it is up to the plaintiff to do so or otherwise. The BDO report is sufficient to show the present of clear and substantial grounds as to why the defendant's claim is bona fide disputed. As stated by the court in *IJM Corporation Bhd v Harta Kumpulan Sdn Bhd* [2007] 8 MLJ 591; [2007] 8 CLJ 291, when a petitioning creditor's debt is disputed on such substantial grounds the court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

D [43] Since the debt upon which the defendant founded its petition is substantially disputed by the plaintiff, the issues of whether the defendant is a 'creditor' and whether the debt is 'due' need to be tried and established first (*Malayan Flour Mill Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591 at p 598; [2000] 7 CLJ 288 at p 296). The defendant had failed to address the challenges to the claimed sum put up by the plaintiff and since the amount owing by the plaintiff to the defendant under the 218 Notice is not an afterthought and substantiated by an external professional investigative audit the defendant is not a 'creditor' within the meaning of s 218(2)(a) of the CA.

F [44] In *Malaysian Resources Corporation Bhd v Juranas Sdn Bhd* [2002] 3 MLJ 169, Vincent J (as His Lordship then was) reminded as follows:
H ... it is important to bear in mind the settled principle that 'a winding up petition is not to be used as a machinery for trying a common law action' (see *Re Imperial Guardian Life Assurance Society* [1869] IX LR 447).

I [45] His Lordship went further and stated:
In my view, the crucial question the court should ask itself is: are there any triable issues which would entail a statutory winding up court being converted into a common law trial court during the hearing of the winding up petition? And, if the answer is in the affirmative, the petition should be dismissed.

[46] Premised on the findings mentioned above, this court is of the considered view that a suitable alternative action would be for the defendant to initiate a writ action and not a winding up proceeding. In coming to the decision this court had taken into consideration the 'balance of the risk of doing injustice' propounded by Lord Diplock in *NWL Ltd v Woods; NWL Ltd v Nelson and another* [1979] 3 All ER 614.

[47] The defendant is not deprived of a remedy. As it is trite that a winding up court should not be used as a debt collection agency, the defendant is entitled to bring an action in the civil courts and seek the recovery of the outstanding debt it intends to obtain. The defendant's claim can be compensated in full by the interest that would have accrued should the defendant be able to prove its claim in the proper forum. The winding up courts should not be encumbered with having to deal with disputed monetary actions.

[48] On the other hand, if the winding up petition is not prevented despite the substantive disputed debt being raised, the plaintiff as a public listed company will be severely affected. Damages would not be an adequate remedy for the plaintiff if the winding up action is proceeded with by the defendant. The risk of doing injustice to the plaintiff is greater than the risk to the defendant. This court should not allow the 218 Notice to be a medium to exert improper pressure in order to force payment of the alleged debt as this would essentially constitutes an abuse of process.

[49] Based on the foregoing reasons, encl 21 is allowed with costs to the plaintiff.

Application allowed with costs.

Reported by Dzulkarnain Ab Fatar